STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2003
v BENNY JUSTICE BACHI, Defendant-Appellant.	No. 235085 Antrim Circuit Court LC No. 00-003392-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DAWN BACHI, Defendant-Appellant.	No. 235111 Antrim Circuit Court LC No. 00-003393-FH

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendants Benny Bachi and his wife Dawn Bachi were each convicted, following a joint jury trial, of larceny by false pretenses over $100, MCL 750.218, and conspiracy to commit larceny by false pretenses over $100, MCL 750.157a. Both defendants were sentenced to five years' probation, with one year to be served in the county jail, and they were jointly ordered to pay restitution in the amount of $34,541.57. Defendants appeal as of right. We affirm.

I. Facts

This case involves allegations of false pretenses that arose from insurance claims submitted by defendants after a suspicious fire destroyed their home on December 20, 1992. On the evening before the fire, defendant Dawn Bachi was visiting friends downstate and defendant Benny Bachi was allegedly at his wife's place of business, a carpet business. After the fire, defendants prepared a property loss form in order to obtain reimbursement for personal items lost in the fire and submitted it to their insurer, Michigan Millers Mutual Insurance Company ("Michigan Millers"). Michigan Millers conducted an investigation and eventually paid

defendants' claim of loss of approximately $142,000, which included the loss of the house and its contents. Defendants subsequently began to build a new home. Defendants also owned a residence which they rented to others.

In 1994, the police conducted searches of defendants' records and parcels of real property pursuant to search warrants issued for the purpose of investigating possible insurance fraud and marijuana sales. A number of personal items were seized during these searches. The prosecutor alleged that these items were the same as those claimed to have been lost and listed on the earlier proof of loss form. A number of the items recovered had significant sentimental value, such as a pink wedding dress, the wedding bouquet, the top of a wedding cake, bride and groom wedding glasses, wedding napkins, and the knife used to cut the wedding cake. In addition, the police recovered three high school yearbooks with notes from defendants' classmates, graduation caps, and photograph albums that contained, among other pictures, photographs showing defendants with a number of the other items seized, including the wedding items. A number of other items seized, such as a baseball glove, a bag of Halls cough drops, an antique boat anchor, a scuba tank, videos, and children's toys, were more mundane but matched items listed on the property loss list.

In total, thirty-two items found were alleged to be the same as those claimed as lost. The items recovered from defendants' rental property were contained in a storage area in the basement of the home. The prosecutor also provided supporting evidence of fraud, including the fact that defendants claimed loss values for items Benny Bachi had inherited from his mother that greatly exceeded the values reported on the inventory listing of his mother's estate.

Defendants' theory of defense consisted of a general denial, and a claim that the items found during the searches were replacements or duplicates of the items destroyed in the fire. They maintained that they resided mainly with Dawn Bachi's mother and used their own home as a "vacation retreat" to explain why a number of the personal items were not lost in the fire.

II. Evidentiary Issues

Defendants first argue that, because they were not charged with arson, the trial court erred by allowing the prosecutor to present evidence suggesting that they were involved in intentionally setting the fire to their home. Defendants maintain that this evidence was improper character evidence under MRE 404b, and was also both irrelevant and unduly prejudicial. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Aguwa*, 245 Mich App 1, 6; 626 NW2d 176 (2001).

Although not the basis for the trial court's decision, we conclude that the evidence was admissible as part of the res gestae of the offenses, independent of MRE 404(b). *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). "Evidence of other criminal acts is admissible when so blended or connected with the crime of which [the] defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Sholl*, *supra*, quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964). Here, as the trial court noted, "the fire was the instrumentality by which Defendants were able to perpetrate the insurance fraud." In the context of this case, the disputed evidence suggesting that defendants were involved in setting the fire to their home was relevant to explain the circumstances of the insurance fraud and, therefore, admissible under

MRE 401 and 402, independent of MRE 404b. Although the trial court addressed the issue under MRE 404b, it reached the right result in determining that the evidence was admissible. Therefore, this issue does not warrant appellate relief.[1] *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

We similarly reject defendants' related argument that the prosecutor improperly suggested during closing argument that defendants deliberately set the fire to their home. Defendants did not object to the prosecutor's remarks at trial and therefore, they must show a plain error affecting their substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). The prosecutor was free to comment on the properly admitted evidence. The prosecutor's remarks did not constitute plain error.

Defendants also challenge the admission of evidence of their financial position at the time of the fire, arguing that it too was irrelevant. Defendants rely on *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980), for the proposition that evidence of poverty, without more, is inadmissible to show motive.

In *Henderson*, our Supreme Court stated that evidence of poverty, dependence on public welfare, unemployment, underemployment, or low paying or marginal employment is generally not admissible to show motive. The Court reasoned that the probative value of such evidence is diminished because it applies to too large a segment of the total population and its prejudicial impact is high. *Id.* However, the Court distinguished between evidence of poverty, or a chronic shortage of funds, which generally would be inadmissible, and evidence that a person is experiencing a shortage of funds or deterioration in financial circumstances that appears to be novel or contrary to what one would expect to be typically felt by that person, which the Court held may be admissible. *Id.*; see also *Smith v Michigan Basic Property Ins Ass'n*, 441 Mich 181, 194; 490 NW2d 864 (1992). Additionally, the Court stated that "the special nature of the crime charged may justify the use of financial embarrassment in order to show the accused's knowledge and motive, as where one is charged with embezzlement or similar financial misconduct." *Henderson*, *supra* at 67 (citation omitted). Thus, evidence of temporary or unusual financial constraints that might lead a person to engage in an economic crime may be admissible in a given case. *Henderson*, *supra*; *People v Jensen*, 162 Mich App 171, 179; 412 NW2d 681 (1987).

In this case, the evidence of defendants' financial situation consisted of defendants' statements concerning personal and business income, bank accounts, real property holdings, and

[1] In a related argument, defendants assert that the prosecutor should have been precluded from introducing this evidence because they were not able to fully examine it. Absent the intentional suppression of evidence or a showing of bad faith, however, a loss of evidence that occurs before a defense request for its production does not require reversal. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Defendants do not claim that the police, the arson investigators, the insurance company, or the prosecution intentionally destroyed any relevant evidence. Thus, this claim is without merit.

property tax information. The evidence concerned defendants' financial situation at the time of the fire and did not suggest that they were poor or chronically short of funds, but rather, had embedded themselves in a financial crisis with no easy solution. The evidence was not offered to show that defendants were generally poor, but to show that, due to their recent financial crisis, they were motivated to collect insurance money as a means of relieving themselves from that crisis. The trial court did not abuse its discretion in finding the evidence relevant and admissible under the circumstances. Moreover, because motive was central to the prosecution's case, and because the theories of motive turned in large part on defendants' financial situation, the trial court did not abuse its discretion in deciding that the probative value of the evidence was not substantially outweighed by any prejudicial effect. MRE 403.

Similarly, evidence that defendants may have later attempted to obtain disability assistance in connection with Benny Bachi's hip disease though a fraudulent property transfer to Dawn Bachi's brother was probative of motive and intent in this fraud prosecution; it was not offered as evidence of defendants' poverty. Therefore, the trial court did not abuse its discretion by allowing this evidence.

Next, defendants argue that the evidence was insufficient to support their convictions. We disagree. At trial, the prosecutor presented more than thirty items of personal property that were seized during searches after the fire, and which the prosecutor claimed defendants had listed on their insurance proof of loss form as having been lost in the fire, thus establishing defendants' intent to defraud their insurance company. On appeal, defendants argue that these items were irrelevant, apparently because no witness directly testified that the seized items were in fact the same as those listed on the proof of loss form. Defendants additionally argue that, because of this deficiency, the evidence was insufficient to support their convictions for false pretenses beyond a reasonable doubt. We disagree.

In a criminal case, due process requires that the prosecution present evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each element of the crime was proven beyond a reasonable doubt. *Id*. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses, *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and is required to make credibility choices in support of the jury's verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences arising from that evidence are sufficient to establish the elements of a crime. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *Nowack*, *supra*.

Initially, we reject defendants' argument that the seized items of personal property that were presented at trial were irrelevant. Relevant evidence is "evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2001). This is a broad definition encompassing all evidence that is helpful in throwing light on any material point, *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001), and all facts on which any

reasonable presumption of the truth or the falsity of a charge can be founded are admissible. *People v Lewis*, 264 Mich 83, 88; 249 NW 451 (1933). In the instant case, defendants were charged with larceny by false pretenses over $100, MCL 750.218, and conspiracy to commit larceny by false pretenses over $100, MCL 750.157a. The elements of larceny by false pretenses are: (1) a false representation concerning an existing fact; (2) knowledge by the defendant of the falsity of the representation; (3) use of the representation with intent to deceive; and (4) detrimental reliance on the false representation by the victim. *Jory*, *supra* at 413; *People v Reigle*, 223 Mich App 34, 37-38; 566 NW2d 21 (1997).

The prosecutor maintained that defendants, knowingly and intentionally, falsely claimed that items of personal property had been destroyed in order to receive payment for the items from their insurance company. Thus, later discovery of those listed items in defendants' possession would clearly be relevant to establishing the elements of the offense. The record discloses that the items presented at trial comported with the items listed on the insurance proof of loss form. Their similarity was established, inter alia, by visual observation at trial and comparison to defendants' written descriptions, witness descriptions, and photographs showing defendants in possession of the alleged items. Several of the items were unique or had unique characteristics, including items from defendants' wedding and their high school yearbooks. The trial court instructed the jury that it was ultimately their decision to determine whether the items presented at trial were, in fact, the same as those listed in the proof of loss form. We find no error in the trial court's determination that the items were relevant and admissible at trial.

Furthermore, viewed most favorably to the prosecution, the evidence was sufficient to enable a rationale trier of fact to find beyond a reasonable doubt that the seized items were the same as those claimed by defendants as having been lost in the fire, and that defendants knowingly and intentionally falsely claimed that they had lost the items, with the intent to deceive their insurance company into paying a false claim.[2] *Reigle*, *supra* at 37-38. Although defendants argued that they had replaced many of the items, or had duplicates of them, the prosecutor was not required to negate every reasonable theory of innocence, but only prove his own theory beyond a reasonable doubt. *Nowack*, *supra* at 400.

Defendants also argue that the trial court erroneously admitted rebuttal evidence, consisting of police testimony and a surveillance videotape of defendants' new home; this videotape was taken the day before and ostensibly was used to discredit the claims of several defense witnesses who testified that Dawn Bachi resided with her mother rather than at the defendants' home. Defendants contend that this evidence was irrelevant and unduly prejudicial under MRE 403. Even if we were to credit defendants' arguments, it is apparent that any error in allowing this evidence was harmless under the circumstances. An evidentiary error does not warrant reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative.

[2] Although defendants also briefly challenge the sufficiency of the evidence at their preliminary examination, any error in this regard would not warrant reversal in light of the prosecutor's presentation of sufficient evidence at trial to support defendants' convictions. *People v Libbett*, 251 Mich App 353, 357-358; 650 NW2d 407 (2002).

People v Smith, 243 Mich App 657, 680; 625 NW2d 46 (2000). Although defendants maintain that the surveillance evidence was unduly prejudicial under MRE 403, because it showed that the police expected defendants to act wrongfully or illegally, it is apparent that the evidence was of little consequence to a determination of this case. Furthermore, after the evidence was presented, Dawn Bachi was allowed to be recalled in order to repeat her previous testimony that she spent only "part" of her time living at her mother's home. Considering the weight and strength of the untainted evidence presented at trial, there is no reasonable probability that the prosecution's rebuttal evidence affected the jury's verdict. Thus, any error in allowing the evidence was harmless.

III. Jury Instructions

Next, defendants argue that the trial court erroneously denied their request to instruct the jury on the defense of mistake in accordance with CJI2d 6.4. We disagree. Defendants' witnesses, and Dawn Bachi in particular, did not claim that the items recovered after the fire were mistakenly listed on the insurance proof of loss form. Rather, Dawn Bachi maintained that the recovered items were either replacements or duplicates of the items that had burned. Because an instruction on mistake was not supported by the evidence at trial, or the theory of the defense, the trial court properly refused to give it. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000).

IV. Motion to Suppress Evidence

Defendants also challenge the trial court's decision denying their motion to suppress the evidence found during the searches of their business property and a residence they were renting to other individuals. Defendants argue that the affidavits submitted in support of the search warrants were insufficient to establish probable cause for the searches. In presenting this issue, defendants provide a laundry list of alleged errors, but fail to provide appropriate citations to the record below and do not cite appropriate supporting authority for their arguments. Moreover, defendants do not reference the applicable standards of review, nor do they address their burden in challenging the validity of the statements made in the affidavits, see, e.g., *People v Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000), or the extent to which allegedly improper portions of an affidavit may be severed such that the validity of a warrant may be tested by the remaining information properly included within the affidavit. See *People v Melotik*, 221 Mich App 190, 200-201; 561 NW2d 453 (1997). "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Given defendants' inadequate treatment of this issue, we find it abandoned. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998); *People v Rollins*, 207 Mich App 465, 468; 525 NW2d 484 (1994).

Furthermore, even if we were to consider the issue, it is apparent that the trial court did not err in finding that the affidavits provided probable cause for the searches. On appeal, a reviewing court evaluates the magistrate's decision to issue a search warrant by examining the supporting affidavit to determine whether the information contained therein provides "a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *People v Whitfield*, 461 Mich 441, 446;

607 NW2d 61 (2000) (citation omitted); see also *People v Echavarria*, 233 Mich App 356, 367; 592 NW2d 737 (1999); *People v Sloan*, 206 Mich App 484, 486; 522 NW2d 684 (1994). Here, the information concerning defendants' financial troubles and reported income inconsistencies, the factual assertions about the suspicious origin of the fire, and the inconsistent valuation of items inherited from Benny Bachi's mother, collectively provided a substantial basis for the magistrate's conclusion that there was a fair probability that evidence of insurance fraud or arson would be found.

Contrary to what defendants argue, information summarizing the experience of the affiant was relevant to the establishment of probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997). Moreover, the inclusion of hearsay information from an informant and others who had previously investigated the fire was not improper. *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991). The reliability of the informant's statement that Benny Bachi sold him marijuana was established by the presence of Benny Bachi's latent fingerprint on the plastic bag of marijuana. See *People v Ulman*, 244 Mich App 500, 509-510; 625 NW2d 429 (2001). Defendants also challenge the inclusion of financial information by the officer who reviewed defendants' tax returns, arguing that he was not qualified to review the information. We note, however, that defendants do not dispute the facts gleaned from the investigation of the financial information. The magistrate was free to make his own determination of whether the information supported a finding of probable cause. In sum, defendant's motion to suppress properly was denied.

V. Restitution and Sentencing

Defendants lastly argue that the trial court erred by ordering them to pay restitution in the amount of $34,541.57, which represented the depreciated value of all personal property items reported as lost in the fire, together with investigation costs. Defendants argue that a restitution award should have been limited to the value of the particular items seized by the police and presented at trial, which was $2,159.51. We disagree.

At the time of sentencing, the Crime Victim's Rights Act authorized restitution "to any victim of the defendant's course of conduct that gives rise to the conviction . . . ." MCL 780.766(2). The term "course of conduct" has been broadly interpreted by our Supreme Court, which has stated that "the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997). The prosecutor has the burden of demonstrating the amount of the loss sustained by a victim by a preponderance of the evidence. MCL 780.767(4). The trial court's factual determinations concerning the amount of restitution are reviewed for clear error. MCR 2.613(C); *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999).

We agree with the trial court's comments at sentencing. A review of defendants' proof of loss form, together with the evidence presented at trial, convinces us that the trial court did not clearly err in finding that a preponderance of the evidence showed that defendants falsely reported the loss of the items listed on the proof of loss form, including those that were not

recovered and presented at trial. Thus, the trial court did not err in ordering restitution in an amount that included the value of all of the personal property claimed to have been lost.[3] *Gahan*, *supra* at 272.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette

[3] Defendants' related argument concerning the trial court's scoring of offense variable 16 of the sentencing guidelines, MCL 777.46, is moot, because defendants have fully served their term of incarceration. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Therefore, we decline to address this issue.